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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The court of appeals rendered no opinion. The oral opinion of the district court (Pet. App. 1a–6a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on March 21, 1975, and the government's timely petition for rehearing and suggestion of rehearing *en banc* was denied on May 8, 1975 (Pet. App. 8a). On May 30, 1975, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including July 7, 1975. The

petition was filed on July 3, 1975, and was granted on October 14, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant is required in order to make an arrest, on probable cause, of a person standing in plain view in the doorway of her residence.

2. If not, whether the police may effect a warrantless arrest if the suspect retreats into her residence.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On August 16, 1974, at approximately 6:35 p.m., Michael Gilletti, an undercover officer with the Philadelphia Narcotics Squad, telephoned Patricia McCafferty (from whom he had purchased narcotics before) and told her that he wished to purchase a "bundle" of heroin (App. 6, 8–9). McCafferty, not knowing that Gilletti was a law enforcement officer, agreed; she told him that they would "go down to Mom Santana's for the dope," which would cost $115 (App. 6). McCafferty also indicated that "Mom" resided at 2311 North Fifth Street (*ibid.*).[1]

Gilletti informed his immediate supervisor of the proposed heroin purchase, arranged for surveillance, and recorded the serial numbers of the bills he intended to use (App. 7, 13–14). At about 7:00 p.m. Gilletti left the police station and met with McCafferty. She directed him to drive to Fifth and Dauphin Streets, where Gilletti parked his car and gave McCafferty $110. McCafferty walked to the residence at 2311 North Fifth Street. She spoke briefly with respondent Alejandro, who was sitting on the front steps, and entered the residence accompanied by Alejandro. Approximately five minutes later Alejandro appeared at the doorway. McCafferty then left the residence and returned to Gilletti's car. After driving about a block and a half, Gilletti stopped the car and McCafferty handed him several glassine packets of heroin. Gilletti arrested McCafferty and

[1] Officer Gilletti stated that he had known Santana previously and had investigated whether Santana might be selling narcotics (App. 16–17, 21–23). Counsel for respondents argued that Gilletti therefore possessed probable cause to arrest her prior to August 16 and for that reason should have obtained a warrant for her arrest. Gilletti testified, however, that he did not trust the informant who had previously implicated Santana (App. 17–19, 23), that Santana had recently moved (App. 16, 21), and that when he personally attempted to approach 2311 North Fifth Street to determine whether Santana now lived there and, if so, whether she would sell him narcotics, he turned back because he feared that he had been recognized by someone who knew that he was an undercover officer (App. 10–12).

gave a pre-arranged signal (indicating a successful purchase) to four surveillance officers who were trailing him in a van (App. 7–8, 29–30, 42). After being given *Miranda* warnings, McCafferty told Gilletti that "Mom Santana has the money" (App. 8).

Upon learning that Santana had the marked money, three of the surveillance officers immediately returned to the row house at 2311 North Fifth Street. As they drove up to the front of Santana's residence, they saw Santana standing in the open doorway with a brown paper bag in her hand.[2] The officers testified that they got out of their van with their weapons drawn. One officer shouted "police" and held his identification in his hand (App. 30–31, 34, 35, 38, 41, 53).[3] When the officers approached the door, Santana retreated into the vestibule (App. 31, 38, 53). The officers followed through the open front door and, as Santana attempted to leave the vestibule and enter the adjoining living room, an officer took her hand and placed her under arrest (App. 31). A struggle ensued during which two "bundles of glazed paper packets [containing] a white powder fell to the floor" (*ibid.*). Respondent

[2] Officer Strohm testified that he recognized Santana, whom he had seen before (App. 34). Strohm's testimony also indicated that Santana was standing directly in the doorway—one step forward would have put her outside the house and one step in the other direction would have put her in the vestibule of her residence (App. 33).

[3] Santana's daughter and daughter-in-law testified that the officers did not identify themselves as police and that the approach of the officers to the house appeared to be a robbery (App. 56–63). The district court did not resolve the conflict between their testimony and that of the officers.

Alejandro, who had been sitting in the living room, picked up the packets and attempted to flee, but he was subdued and arrested by another officer (App. 53).

Following the brief scuffle, Santana was asked to empty her pockets. She complied, producing $135, of which $70 could be identified as marked money given by Gilletti to McCafferty (App. 39, 45). The bag that Santana had been holding was found to contain heroin, packaged as "15 bundles of white powder in glazed paper packets" (App. 31).

2. An indictment filed in the United States District Court for the Eastern District of Pennsylvania charged McCafferty with distribution of heroin, in violation of 21 U.S.C. 841, and Santana and Alejandro with possession of heroin with intent to distribute, in violation of the same section. McCafferty pleaded guilty. Santana and Alejandro moved to suppress the heroin and money found during and after their arrests.[4]

The district court read its opinion from the bench on November 13, 1974 (Pet. App. 1a–6a). The court concluded that "[t]here was strong probable cause [to believe] that [respondent] Santana had participated in the transaction with Defendant McCafferty"

[4] It is unclear what grounds, if any, provide respondent Alejandro with standing to challenge the seizure of the heroin and money. At least to the extent the ostensible illegality consisted of a failure to obtain a warrant for Santana's arrest, there would seem little basis to accord Alejandro standing. However, the government did not contest his standing in either the district court or the court of appeals and, accordingly, we have not presented it as an issue for resolution by this Court.

(Pet. App. 3a). The court asserted that it did not wish to "criticize" the "difficult decisions" made by the officers "under the extreme emergency posture of a case like this" (*id.* at 5a). The court nevertheless suppressed the evidence. The court apparently concluded that the arrest was unconstitutional because made without a warrant. "The key to the case in the court's view is the basis upon which a warrantless entry into a person's residence can be made for either an arrest or a search" (*id.* at 2a). After recounting that an officer had testified that he went to the house to arrest respondent Santana, the court stated that this would "require a warrant, * * * a warrant of arrest under ordinary circumstances * * *" (*id.* at 3a).

The court listed a number of factors that, it asserted, lent support to the officers' decision to make a warrantless arrest in this case—the suspected offense was "grave" and not "complacent" (*id.* at 3a); there was strong probable cause to believe that Santana had participated in McCafferty's distribution of heroin to Gilletti (*ibid.*); there was strong evidence that Santana was on the premises (*ibid.*); and the arrests occurred during the daytime (*id.* at 4a). But, the court concluded, there was no indication that either respondent was armed or intended to flee; there were enough officers to surround the house and prevent an escape; and, because some of the marked money was found in Santana's pocket, "there was no basis to conclude that it was to be destroyed" (*id.* at 4a).

The district court then rejected the government's argument that Santana's arrest could be considered

part of the "hot pursuit" immediately after a crime; the court stated that hot pursuit means "a usual kind of a chase in and about public streets or places or even in and about a building" (*id.* at 4a–5a). Because it thought that there was no chase in this case, the court declined to uphold the arrest.

The United States appealed. The court of appeals affirmed without opinion (Pet. App. 7a).

SUMMARY OF ARGUMENT

I

A. This Court has held, without deviation, that probable cause is sufficient to support a warrantless felony arrest in a public place. See *Gerstein* v. *Pugh*, 420 U.S. 103, 111–116. There is no reason to depart from that rule, which adequately protects both the interest of society in apprehending criminals and the interest of the individual in his personal privacy. If the Court accepts the argument in this regard that we made in *United States* v. *Watson*, No. 74–538, argued October 8, 1975, this part of our argument in this case follows *a fortiori*. Indeed, the argument for the arrest of respondent Santana is even stronger than was the argument for the arrest of Watson; here, probable cause developed only moments before the arrest, and there was considerable risk that, had the officers delayed before arresting Santana, she would have found out about the arrest of McCafferty and, upon so learning, fled or destroyed the heroin and money she was known to possess.

B. The officers approached Santana as she was standing in plain view in the doorway of her residence. This is fully equivalent to approaching a suspect in a public place. Santana had abandoned any claim to the privacy of her whereabouts when she knowingly exposed herself to the view of all who were in the vicinity. She placed herself in the plain view of the officers who, having seen her, were entitled to approach her. It is not material to this argument that the officers had to enter the "curtilage" of Santana's house. The front walk and door of a house are intended as means for persons to approach the house, and the officers did not need advance judicial approval in order to use them in this invited way. By like reasoning, officers often approach the door of a house and ask for consent to enter. Accordingly, there was no impropriety whatsoever in the officers' attempt to effect a probable cause felony arrest of Santana as she stood in her doorway.

II

Since the officers were entitled to approach Santana, the evidence recovered incident to her arrest is admissible in evidence unless, by retreating into her vestibule as the officers approached, Santana acquired "sanctuary," compelling the officers to desist in their efforts and requiring them to obtain a warrant.

A. Assuming *arguendo* that officers ordinarily should obtain a warrant before entering a private residence in search of someone they have probable

cause to arrest, it does not follow that the entry into Santana's vestibule to arrest her was unconstitutional. The entry was not made in "search" of Santana. Santana had been observed in public view. The officers knew where she was and simply followed her through an open door. Entry onto her premises was necessary only because Santana sought to flee the police, and they were obliged, if they wished to make the arrest, to pursue her. We accordingly submit that this case falls squarely within the parameters of the traditional "hot pursuit" doctrine, even under the narrowest reasonable understanding of that doctrine.

But even had Santana not been literally "chased" into the house, the "hot pursuit" doctrine, correctly understood, authorized the officers' warrantless entry to effect her arrest. The doctrine is generally applicable, as an exception to whatever warrant requirement might otherwise exist, to arrests occurring within a reasonably short time after the commission of a crime. As is clear from *Warden* v. *Hayden*, 387 U.S. 294, the doctrine does not rest exclusively upon a "chase in and about public streets" (Pet. App. 5a). There was neither "chase" nor "pursuit" in *Hayden* itself; the arresting officers came to the house in which they found Hayden as the result of a tip received shortly after the crime.

The exception most logically rests upon the realization that some opportunities will be lost

forever if not capitalized upon at once. During the first few hours after a crime, the culprit is likely to be in possession of fruits, instrumentalities and other evidence of the crime; he may dispose of them as time passes. The culprit himself may be most accessible shortly after the crime, before he has had time to flee. Once substantial time has passed after the events, it may make sense to suppose that whatever is going to disappear, has disappeared, and that the additional time necessary to obtain a warrant will not unnecessarily jeopardize the investigation. But during the first few hours time may be of the essence; it is often impossible to tell, in a particular instance, whether evidence will disappear or whether the suspect will try to escape. In order to anticipate these exigencies it is reasonable for law enforcement officers to make the arrest quickly, before the feared events can come to pass.

B. We also submit that, apart from "hot pursuit," an arrest ordinarily can be made in a private place whether or not a warrant could have been obtained. At common law in England it was settled from at least 1603 that officers could enter a house to make a warrantless arrest. The courts have imposed only three requirements on these arrest entries: the official action must be reasonable; the arrest must be supported by probable cause; and, before using force to enter, the officers must announce their purpose and authority. Nearly every State has adopted these principles, and this Court has accepted that rule as part of our constitutional heritage (*e.g., Ker* v. *California,* 374 U.S. 23). That courts and legislatures

have for centuries followed a settled practice must, as a matter of sound constitutional doctrine, give pause to the impulse now to pronounce a different rule.

Although some lower federal courts, and three state courts, have abandoned the common law rule, more than history suggests that this Court should adhere to the traditional approach. As the American Law Institute put the matter, to "require a warrant or a showing of necessity before police may make a felony arrest on private property even in daytime seems unduly restrictive." ALI, *A Model Code of Pre-Arraignment Procedure* 146 (Official Draft 1972). To take the alternative course open here—to put a suspect under "house arrest" while seeking a warrant—would itself infringe substantially on the suspect's legitimate interests while incurring unacceptable risks to legitimate law enforcement ends. If Santana had discovered the "house arrest," she could have destroyed the evidence she was known to possess and could have attempted to arm herself to repulse the officers when they eventually attempted to arrest her. In sum, there are important social interests that call for different rules for entries to seize people from those governing entries to seize things.

C. If the Court nevertheless concludes that warrants may ordinarily be required for entries to arrest, the principle ought not be extended beyond the particular circumstances that would call for such advance judicial approval. As *Jones* v. *United States,* 357 U.S. 493, 499–500, indicated, the privacy interests of the individual are most powerfully implicated in

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forcible nighttime arrest entries. These interests can be fully protected by a rule that requires warrants only in those cases. To go further and create a presumptive warrant requirement, subject to defeasance in the many and varied instances where haste is appropriate, would offer little useful guidance to the officers charged with carrying out the rule. It would be difficult if not impossible for them to consider and "balance" the host of factors that would be relevant to such decisions, and the result might be repeated suppression of valuable evidence without any discernable improvement in the protection afforded individual privacy.

D. The arrest of Santana would come within the logical exceptions to even the most sweeping warrant requirement. There was "strong probable cause" to arrest Santana (Pet. App. 3a) for a crime committed only minutes before the arrest; there was absolute certainty that Santana was on the premises entered; no force was involved in the entry, which took place during daylight hours; an ongoing criminal activity was terminated. Moreover, the officers were aware of the possibility that Santana would learn of McCafferty's arrest and either flee or destroy evidence. Flight or destruction of evidence would have been quite likely if the officers had stopped at the threshhold as Santana retreated. It was therefore reasonable in these circumstances for the officers to pursue Santana into her vestibule.

E. Finally, even if the officers should not have entered Santana's vestibule without a warrant, the

evidence they seized should be admissible. Where, as here, the seizure was a fruit of the arrest itself (the marked money was recovered from Santana's person, and the heroin from a bag she had been carrying), rather than from the fact that the arrest occurred in a private place, the exclusionary rule has no proper role to play. The seizure was not attributable to the fact that the officers were in a place where they should not have been. All the items of evidence equally would have been seized if Santana had not retreated.

ARGUMENT

The district court held that the arrest was defective because made without a warrant. If Santana was lawfully arrested, the items seized incident to her arrest are admissible in a prosecution against either her or respondent Alejandro. Although the court of appeals did not render an opinion when it affirmed the district court's order, we can perceive only two possible grounds that would support an affirmance. First, the court of appeals may have concluded that all arrests require warrants in the absence of circumstances more "exigent" than "the extreme emergency posture of a case like this" (Pet. App. 5a). Second, the court of appeals may have concluded that, although probable cause is usually sufficient to support a felony arrest, a warrant was required here because Santana was arrested in the vestibule of her residence. We submit that neither of these alternative grounds is supportable.

We demonstrate in Part I of the argument that follows that an arrest for a felony is constitutional if the arrest is supported by probable cause. In Part II we discuss the effect of the fact that the arrest took place within Santana's residence and demonstrate that such an entry was reasonable under the circumstances of this case. The seizure of the marked money and heroin—incident to a lawful arrest—was therefore proper, and these items are admissible at trial against respondents.

I. NO WARRANT IS NECESSARY TO MAKE A PROBABLE CAUSE ARREST OF A PERSON STANDING IN PLAIN VIEW IN THE DOORWAY OF HER RESIDENCE

A. PROBABLE CAUSE SATISFIES THE FOURTH AMENDMENT'S REQUIREMENT OF REASONABLENESS

This Court has held, without deviation, that probable cause is sufficient to support a felony arrest with or without a warrant. We have argued in *United States* v. *Watson,* No. 74–538, certiorari granted, 420 U.S. 924, that there is no reason to depart from this rule.[5] We rely here upon the arguments made in our brief in *Watson.*

At common law in England, and today in all 50 States, the law has permitted felony arrests to be made upon probable cause or its equivalent, whether or not there was sufficient time to obtain a warrant. This Court too has concluded that a warrantless felony arrest is reasonable within the meaning of the Fourth Amendment if it is supported by probable cause. It

[5] Copies of our brief in *Watson* have been sent to counsel for respondents.

stated in *Carroll* v. *United States,* 267 U.S. 132, 156–157:

> ** * [A] police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and * * * he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.

Since *Carroll* this Court repeatedly has upheld warrantless arrests on probable cause. One of those cases, *Henry* v. *United States,* 361 U.S. 98, involved 18 U.S.C. 3052, a statute authorizing agents of the Federal Bureau of Investigation to make warrantless arrests. The Court, speaking through Mr. Justice Douglas, held that the statute "states the constitutional standard" (361 U.S. at 100). And in *Gerstein* v. *Pugh,* 420 U.S. 103, 111–116, the Court observed that probable cause arrests never have been invalidated solely because officers failed to obtain a warrant and implied in the plainest terms that the issue of warrantless arrest remains unsettled only to the extent that the arrest takes place within a residence or other private place.

We submit that, in light of the constitutional history and applicable precedents, developed more fully at pages 14–26 of our brief in *Watson,* there could be no question concerning the constitutionality of respondents' arrests, if the arrests had occurred in a public place. Indeed, if the arrests had occurred in a public place, the argument for their constitutionality would be even stronger than that in *Watson.* In the present case, the arresting officers had "strong probable cause" (Pet. App. 2a) to believe that only

moments before the arrest Santana had sold heroin to McCafferty. McCafferty had identified Santana as the prospective source, had entered Santana's residence and, after emerging, producing heroin, and being arrested, had stated that Santana had the purchase money. The officers had probable cause to believe that Santana had supplied the heroin, was in possession of the purchase money, and was likely to be in possession of still more heroin. Moreover, although there was an opportunity to obtain a warrant for Watson's arrest, there was no comparable opportunity here unless the officers were willing to tolerate the considerable risk that Santana or Alejandro would learn of McCafferty's arrest and, upon so learning, flee (or dispose of, secrete or destroy the heroin and money they were known to possess).[6] So, too, the officers had reason to believe that Santana was committing the continuing offense of possession of heroin with intent to distribute; an immediate arrest would terminate the offense as it was being committed. *Trupiano* v. *United States*, 334 U.S. 699, 704–705; *United States* v. *Weaklem*, 517 F. 2d 70 (C.A. 9). Therefore, even if the Court should decide that a warrant was required

[6] Respondents argued in the district court that Officer Gilletti had probable cause to arrest Santana in advance of the transaction on August 16, and that the officers should have obtained a warrant during this interval. The evidence, which we have recounted at note 1, *supra*, does not support this theory.

Even if Officer Gilletti could have obtained a warrant for Santana's arrest in advance of the transaction with McCafferty, this fact would be immaterial, for the reasons we have discussed at pages 19–26 of our brief in *Watson*. What is more, the transaction between Santana and McCafferty furnished the officers with fresh

for Watson's arrest, no warrant would be required for Santana's arrest.[7]

The argument to this point has analogized the arrest of Santana to an arrest of a person observed in a public place. We now discuss the possibility that a person standing in plain view in the doorway of a residence should be treated differently.

B. THE ARREST OF A PERSON STANDING IN AN OPEN DOORWAY IS SUBJECT TO THE SAME RULES AS THE ARREST OF A PERSON IN A PUBLIC PLACE, BECAUSE THE EXPECTATIONS OF PRIVACY ARE SIMILAR

When the arresting officers arrived at Santana's residence, Santana was standing in the open doorway of her residence with a brown paper bag in her hand. She was in the plain view of the officers and of anyone else who passed by on the street. Although Santana was not in a public place, we submit that by standing in public view Santana abandoned most of the privacy to which she would have been entitled in

probable cause to arrest Santana for a recently committed offense. There was no opporunity for the officers to obtain a warrant with respect to the offense for which respondents were arrested, and the arrests would consequently be proper even if the officers were required to obtain a warrant to arrest Santana for an offense committed on some previous occasion. The court that decided *Watson* has limited it to cases in which there was a substantial delay between the acquisition of probable cause and the arrest. See *United States* v. *Weaklem*, 517 F. 2d 70, 72 (C.A. 9). Cf. our brief in *Watson* at pages 19–20, n. 10.

[7] It follows that it was proper to arrest respondent Alejandro, who scooped up two packets of heroin and attempted to flee (App. 53).

the interior of her home, and that the officers could approach her for the purpose of arresting her, just as if she had been in a public place.

The officers' observation of Santana, and their approach to her for the purpose of arresting her, are perhaps most closely analogous to the "plain view" doctrine that supports the seizure of objects. Santana was seen in plain view by officers who had a right to be upon the public streets. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure * * *" (*Harris* v. *United States,* 390 U.S. 234, 236). Santana abandoned her claim to personal privacy by willingly exposing herself to public observation. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" (*Katz* v. *United States,* 389 U.S. 347, 351).

The officers did not intrude upon Santana's property to make their observation of her. But even if they had not observed her until they were approaching her front door, their observations and approach would have been reasonable within the meaning of the Fourth Amendment. In *Air Pollution Variance Board of Colorado* v. *Western Alfalfa Corp.,* 416 U.S. 861, the Court upheld an inspector's entry into the property of the corporation for the purpose of making observations, where the observations occurred at a place from which the public was not excluded. The public ordinarily is not excluded from the areas immediately adjacent to houses. Indeed, the driveway and front

walkway of houses are usually thought of as means of access, to be used by all who arrive. Therefore, even if Santana had not been in plain view, it would have been permissible for the officers to approach Santana's residence, to ring the bell, and to inquire whether Santana was within.[8] If that is so, then there can be no reasonable question concerning the power of the officers to approach someone standing in plain view in the doorway of her residence.[9]

II. A WARRANT IS NOT REQUIRED TO EFFECT THE PROBABLE CAUSE ARREST OF A PERSON WHO, UPON BEING CONFRONTED BY ARRESTING OFFICERS, RETREATS INTO HER RESIDENCE

We have argued that the officers were entitled to approach Santana in the doorway of her home and to arrest her there. As the officers approached her, with guns and at least one identification card displayed

[8] Cf. *United States* v. *Magana,* 512 F. 2d 1169 (C.A. 9), certiorari denied, October 6, 1975, No. 74–1361. Federal agents drove a van onto the driveway of a private residence and arrested the occupant, who was standing in plain view between the house and the garage. The occupant contended that the entry upon the driveway was improper and that, because he could not have been seen from the street, his arrest was consequently improper. The court of appeals rejected this argument, relying upon *Katz*; it held that law enforcement officers, no less than private citizens, are entitled to use driveways and walkways that give access to a house. See also *United States* v. *Capps,* 435 F. 2d 637 (C.A. 9); *United States* v. *Langley,* 466 F. 2d 27 (C.A. 6).

[9] Cf. *Ponce* v. *Craven,* 409 F. 2d 621, 624–625 (C.A. 9), certiorari denied, 397 U.S. 1012 (officers standing in a parking lot see and hear occupants of motel room committing a crime; warrantless entry to make arrest upheld); *Gil* v. *Beto,* 440 F. 2d 666 (C.A. 5); *Taylor* v. *Arizona,* 471 F.2d 848 (C.A. 9), certiorari denied, 409 U.S. 1130.

(see page 4, *supra*), she retreated from the doorway into the vestibule. There was but a slight distance from the curb to Santana's door, however, and an officer overtook her before she retreated further from the vestibule into the living room of her residence. We submit that the arrest was not the less reasonable because it took place in the vestibule rather than on the doorstep. An individual is not entitled to seek "sanctuary" in her home as the police approach to effect a lawful arrest.

We discuss, in turn, two alternative arguments that support this result. We contend, first, that even if a search or arrest warrant ordinarily is required before officers can enter a residence to make an arrest, that requirement does not apply when the officers follow an individual into her home in fresh pursuit soon after a crime has been committed. Alternatively, if this case is not considered suitable for analysis under an analogue to the fresh pursuit rationale, we argue that the arrest still must be upheld because warrants are not generally required to make probable cause arrests even within an offender's residence. Finally, we argue that even if the officers should have obtained a warrant in this case, the evidence should be admitted because it was a fruit of the arrest rather than a fruit of the entry or of any search of the premises.

A. OFFICERS ARE ENTITLED TO ENTER A RESIDENCE IN PURSUIT OF A SUSPECT DISCOVERED ONLY MINUTES AFTER THE COMMISSION OF A CRIME

Assuming *arguendo* that officers ordinarily should acquire a warrant before entering a private residence

in search of someone they have probable cause to arrest, it does not follow that the entry into Santana's vestibule to arrest her was unconstitutional. Indeed, the very statement of the constitutional right suggested by the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480, demonstrates its inapplicability to cases of the present sort. The officers did not enter Santana's residence *in search of her;* they simply followed her through the open door. No "search" for her was necessary, and none was conducted.

1. In the district court and the court of appeals the government analogized the officers' conduct to the "hot pursuit" entry approved in *Warden* v. *Hayden*, 387 U.S. 294, 297–299. The district court rejected this analogy, stating that the "hot pursuit" rationale applies only to the "usual kind of a chase in and about public streets or places or even in and about a building" (Pet. App. 5a). Because in its view this case involved no "chase" that "ended up into [*sic*] the house" (*ibid.*), the court concluded that there had been no "hot pursuit."

We agree with the district court that the expression "hot pursuit" seems to imply some sort of "chase." To the extent that a "chase" or "pursuit" is a necessary ingredient of the doctrine, however, we submit that it was present here. The officers had seen Santana from a public place and properly approached her in order to arrest her. When Santana retreated, the officers followed her in close pursuit. The "hot pursuit" doctrine reasonably requires no more in the way of a

"chase" than action by officers to follow an individual fleeing from the outside of a private place into the inside. Cf. *Commonwealth* v. *Hughes*, 219 Pa. Super. 181, 280 A. 2d 556, in which the Pennsylvania court approved a warrantless arrest entry when a suspect, discovered in the hallway of an apartment building, retreated into one of the rooms.[10]

In short, even under the most narrow reasonable understanding of the traditional "hot pursuit" doctrine, Santana's arrest was lawful. We believe that the Court need go no further. We present the arguments that follow, however, out of an abundance of caution, aware that the Court on several occasions has expressed concern about warrantless entries to make arrests.[11]

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[10] The approval by Pennsylvania courts of an arrest similar to that of respondent Santana is significant because, if an arrest by state officers passes muster under state law, only federal constitutional issues remain. *Miller* v. *United States*, 357 U.S. 301, 305–306. We would argue in an appropriate case that evidence seized as a result of an arrest meeting all constitutional standards can be introduced in a federal prosecution without regard to the legality of the arrest under state law. Cf. *Elkins* v. *United States*, 364 U.S. 206, 223–224; Fed. R. Evid. 402. Since the arrest in this case was lawful under state law, however, it is unnecessary for the Court to consider that argument in this case.

[11] We present them, too, to inform the Court of our position in light of the brief filed by the Americans for Effective Law Enforcement and the National District Attorney's Association. *Amici* assume (perhaps relying upon the "negative inference" from *Warden* v. ~~Hughes~~, *supra;* see note 20, *infra*) that a warrant ordinarily is necessary to make an arrest entry and that this case therefore requires an explication of the "exigent circumstances" doctrine. As our argument indicates, we believe that arrest entries can be made in many cases whether or not the circumstances are "exigent" in the sense that they would justify an entry for purposes of a search.

Hayden

2. Although we believe that there was "pursuit" in this case, we submit that, correctly understood, the "hot pursuit" doctrine does not require such direct pursuit. In fact, "hot pursuit" has been used in two senses, both by this Court and in the common law. The first sense, on which we rely in the preceding argument, has involved an actual chase. Courts have held that, when officers chase a suspect into a building, the officers can follow without observing the ordinary requirement (codified at 18 U.S.C. 3109) that they announce their authority and purpose. See Wilgus, *Arrest Without A Warrant,* 22 Mich. L. Rev. 541, 798, 804 (1924). "Where such circumstances as an escape and hot pursuit by the arresting officer leave no doubt that the fleeing felon is aware of the officer's presence and purpose, pausing at the threshold to make the ordinary requisite announcement and demand would be a superfluous act which the law does not require." *Ker* v. *California,* 374 U.S. 23, 55 (Brennan, J., dissenting in part). In such cases the chase is the essence of the rule, for it is the chase itself that puts the suspect on notice of the officers' authority and purpose and therefore excuses pausing at the threshold to give notice of authority and make demand to enter. The physical fact that there has been a chase serves to dispose with a prerequisite to forcible entry that must otherwise be observed.

"Hot pursuit" was used in quite another sense in *Warden* v. *Hayden, supra,* for in that case the "hot pursuit" supplied the reason to enter a house in search of a suspect. In *Hayden* officers who had not per-

sonally witnessed a robbery were informed by a taxi driver that a man resembling the robbery suspect had entered a certain residence. The officers promptly entered the residence and fanned out throughout the house. One officer arrested the suspect; another officer, searching the inside of a toilet tank, came upon a gun that had been used in the robbery; still a third, searching through a washing machine in the basement, found clothing that the robber had worn. The Court upheld not only the entry into the house and the arrest but also the thorough search. It concluded that the officers were not required to delay in the course of their investigation to obtain a warrant, where that delay might have allowed the suspect to escape, to endanger others, or to destroy evidence. The Court recognized that some things are evanescent; even though the suspect was apprehended in his own home, he might not have remained there, or he might have succeeded in destroying the evidence. The officers could have surrounded the house and sought a warrant, but the Court did not require them to do so.

There was no "chase" in *Hayden*. The suspect was inside his home when the officers learned of his whereabouts. Nor has there been a "chase" in other recent cases applying the "hot pursuit" doctrine. For example, in *United States* v. *Holland*, 511 F. 2d 38 (C.A. 6), certiorari denied, 421 U.S. 1001, the officers apprehended the suspect approximately an hour after the crime as a result of detective work and leads compiled by visiting several addresses to which the suspect might have repaired; there was no chase. In *United States* v. *Scott*, 520 F. 2d 697 (C.A. 9), the officers

apprehended their suspect nearly two hours after the crime, having tracked down the car that the suspect apparently had used and found his location by patiently ascertaining where he had *not* gone; there was no chase. Cf. *United States* v. *Monteill*, C.A. 2, No. 75–1274, decided November 26, 1975. Whether or not cases like these use the term "hot pursuit," they share a common feature: the officers are acting as part of a chain of events leading, with only brief interruptions, from the crime directly to the arrest.

We submit that these cases are correctly decided. Even if there ought to be a requirement of a warrant, in ordinary circumstances, before officers can enter a house to search for a suspect, these cases correctly create an exception for entries in the course of a reasonably prompt investigation during the hours immediately after the crime. The exception is supported by the certainty that some opportunities will be lost forever if not capitalized upon at once. During the first few hours after the crime the culprit is likely to be in possession of the instrumentalities and fruits of the crime; he may dispose of these as time passes. During the first few hours after the crime an arrest of the culprit is most likely to yield evidence (whether clothing, as in *Warden* v. *Hayden, supra;* or fingernail scrapings, as in *Cupp* v. *Murphy*, 412 U.S. 291; or something else) that may disappear if given the chance to do so. Once substantial time has elapsed after the crime, it may make some sense to presume that whatever is going to disappear, has disappeared, and, upon that presumption, to conclude that the few hours of additional delay necessary to procure a war-

rant will not unnecessarily jeopardize the investigation or further diminish the chances of capture. But during the first few hours time is of the essence; it is often impossible to tell, in any individual case, what evidence will disappear, or whether the suspect will try to escape. And, in consequence, it is reasonable for law enforcement officers to be free to move quickly in all cases, before the feared events can come to pass.

At the same time, an entry to make an arrest during the time shortly after the crime has been committed poses few of the dangers that might ordinarily be thought to accompany warrantless entries in search of suspects. Almost by definition, the entry soon after the crime will not be a pretextual entry—an entry purportedly to arrest but actually to search the premises. By defining the requisites of entry in such a way that it is part of the reasonably continuous flow of events after the crime, it is possible to ensure that the officers are not staging their arrest at a time most likely to enable them to search.[12] Similarly, because the officers are acting upon information and facts that may be only a few minutes old, there is little likelihood that premises will be entered on the basis of faulty memories, or to search for evidence of crimes that may (or may not) have occurred long ago.

It could be argued in opposition that, although this is true in the run of cases, the exigencies calling

[12] And, of course, the problem of pretextual arrests has been significantly alleviated by *Chimel* v. *California*, 395 U.S. 752, which held that a search incident to arrest is confined to the immediate whereabouts of the person arrested.

for a warrantless entry to make an arrest do not apply in some other cases. In the instant case, for example, the district court concluded that the arresting officers had no proof that respondents would have fled or destroyed evidence if they had delayed their investigation to obtain a warrant. And that may well be true. But the justification supporting expeditious action after a crime has been committed ought not to turn upon the question whether, in a particular case, flight appeared to be or was imminent or evidence was soon to be destroyed. The entry to make a warrantless arrest is reasonable within the meaning of the Fourth Amendment because it is reasonable to suppose that in many instances within this class of cases flight will occur or evidence will be destroyed. To require the officers to deduce, on the spur of the moment, whether the felon they are then and there apprehending is likely to flee or to destroy or secrete evidence if given the opportunity, is to require the impossible. It should be enough that flight and destruction of evidence occur soon after a crime in many cases.

We submit that the Court should hold here, as it held in *United States* v. *Robinson*, 414 U.S. 218, that the nature of the justification for the official conduct is such that the conduct is reasonable as applied to all cases arguably within the scope of that justification, whether or not the officers can point to particular factors that would make their actions imperative in the particular case. See generally LaFave, *"Case-by-Case Adjudication" Versus "Standardized Proce-*

dures": *The Robinson Dilemma,* 1974 Sup. Ct. Rev. 127. "A highly sophisticated set of rules, qualified by all sorts of ifs, and, and buts * * * may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' If the rules are impossible of application by the police, the result may be the sustaining of motions to suppress on Fourth Amendment grounds with some regularity, but this can hardly be taken as proof that 'the people' are 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' Rather, that security can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement" (*id.* at 141–142; footnotes omitted).[13]

There will, of course, be many occasions for which categorical rules will be inappropriate and on which

[13] Professor LaFave suggests that, whenever possible, the courts should attempt to establish generalized rules applicable to categories of cases—rules capable of statement in such a way that proper police conduct can be ascertained beforehand, without the need for sophisticated on-the-spot balancing of many competing factors. He contends that there are many sorts of case in which the "balancing" necessary to determine whether the official conduct is "reasonable" can be accomplished by the judiciary and incorporated into rules capable of mechanical application. The rule that arrest entries may be made without a warrant during the hours immediately after a crime has been committed is such a rule and, we contend, is justified by the balance of considerations applying to such cases as a class.

individualized determinations of the reasonableness of official conduct will be necessary. We do not advocate the abolition of case-by-case inquiries when circumstances call for them. But rules of general applicability sometimes are feasible and, when they are, can reduce the need for individualized determinations. Cases involving arrests reasonably promptly after a crime are, we submit, appropriately dealt with by a categorical rule arrived at by prior balancing of the interests involved.

The instant case fits comfortably within the class of cases that would be addressed by such a categorical rule. The officers acted promptly after a crime had occurred. They apprehended one of the perpetrators of that crime and were able to preserve critical evidence. Their actions averted any possibility of flight or disappearance of evidence that might have occurred if respondents had found out about the arrest of McCafferty. See *United States* v. *Mapp,* 476 F. 2d 67, 74 (C.A. 2).[14] Furthermore, the prompt arrest terminated the crime of heroin possession then being

[14] "Mapp, who had just been arrested, was entitled to make one telephone call, a call he might have placed to Mrs. Walters, warning her of the imminent danger of arrest. * * * It was also possible that Mapp planned to return to Mrs. Walter's apartment within a few hours; his failure to return, as a result of the arrest, might have alerted Mrs. Walters to possible danger, resulting in the destruction of evidence."

committed by Santana and foreclosed the possibility that she would be able to accomplish further criminal distributions of the substance.

B. A WARRANT ORDINARILY IS NOT REQUIRED TO ENTER A PRIVATE PLACE IN ORDER TO SEARCH FOR SOMEONE WHOM THERE IS PROBABLE CAUSE TO ARREST

The police officer's decision to arrest brings into conflict two basic social interests: the interest in apprehending those guilty of crime, and the inconsistent interest of the individual in the privacy of his own person. We discussed in our brief in *Watson* the manner in which these competing interests have been accommodated. Excluding brief investigative stops of the kind considered in *Terry v. Ohio,* 392 U.S. 1, and like cases, the individual's interest gives way only if the officer possesses probable cause, and the existence of probable cause may properly be put to the test by a judicial hearing shortly after the arrest rather than by an *ex parte* warrant application prior to it. This accommodation gives a substantial measure of protection to the interest of the individual, while recognizing that investigations could be frustrated by a requirement of antecedent judicial approval of arrests. See *Gerstein* v. *Pugh,* 420 U.S. 103, 111–116.

An additional interest is involved when the officers must enter a private place to search for the person

to be arrested. An arrest entry implicates not only the individual's interest in the privacy of his person, but also his interest (and possibly that of other occupants of the place) in the privacy of his surroundings. Law enforcement officers ordinarily cannot enter a private place to *search* for things until they have received the prior approval of a neutral and detached magistrate; this rule applies even when the officers, once having found the thing they seek, can *seize* it without additional prior approval.

Proceeding by analogy, it would be possible to argue that the same rule should apply to entries to make an arrest. Although officers can seize a person and arrest him without an arrest warrant, they arguably should be required to obtain a search warrant in order to enter a private place to search for him.[15] This argument is apparently logical, and it has the virtue of producing symmetry between the law of entry to conduct a search for things to be seized and the law of entry to conduct a search for persons to be seized. But we submit that the argument is not without its flaws. People

[15] See generally Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stan. L. Rev. 995 (1971). An arrest warrant may do service for a search warrant, at least for purposes of searching the subject's house.

are more mobile than things, and this difference may call for different rules. History, too, has its claims. For nearly 400 years Anglo-American law has recognized the difference between an entry to search for things and an entry to search for people. We begin with an analysis of this history.

1. *At Common Law In England, And In The United States At The Time The Fourth Amendment Was Adopted, Warrantless Entries To Make Arrests Were The Accepted Practice*

The most authoritative discussion of the common law power of officers to make arrests in private places appears in *Semayne's Case,* 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603). The Kings Bench, while acknowledging that "the house of every one is to him as his * * * castle and fortress, as well for his defence against injury and violence, as for his repose * * *" (5 Co. Rep. at 91b), concluded that his house furnished no refuge when he had committed a felony. It declared that "[i]n all cases when the King * * * is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors * * *" (*ibid.*).

In cases in which the official action was reasonable, there was probable cause to arrest, and force was not needed to enter, the rule allowing entry to make warrantless arrests has been followed in England without deviation, so far as we are aware. Indeed,

most courts and commentators adopted the further position that force could be used to make a warrantless arrest so long as the officers gave notice of authority and made demand to enter before breaking in. This seems to have been the general rule. See Sheppard, *The Offices of Constables,* ch. 8, § 2, no. 4 (1650):

> For it is the chief part of their office to represse fellony, and albeit it be a man's house he doth dwell in, which they doe suspect the fellon be in, yet they may enter in there to search; and if the owner of the house, upon request, will not open his dores, it seems that the officer may break open the dores upon him to come in to search.

See also 1 Hale, *Pleas of the Crown* 582–583 (1847). Other commentators were of opinion that, in the absence of fresh pursuit, a warrant should be obtained before breaking doors. See 2 Hawkins, *Pleas of the Crown,* ch. 14, § 7 (1787); Coke, *Fourth Institute of the Laws of England* 177 (1797). No one questioned the rule that if force were not used to enter, no warrant was necessary.

The English courts were concerned not with warrantless entries to make arrests, but with searches and arrests authorized by warrants and supported by less than probable cause. See generally Taylor, *Two Studies in Constitutional Interpretation* 27–43 (1969). In the 18th century the government's policies (and the king himself) came under cirticism that many

officials believed was seditious. In an attempt to put an end to the criticism, the king's agents issued warrants authorizing extensive searches and arrests directed against the suspected authors of the anti-government literature. The officials who executed these warrants were sued in trespass, leading to the landmark case of *Entick* v. *Carrington,* 19 How. St. Tri. 1029, 95 Eng. Rep. 807 (K.B. 1765). *Entick* condemned the use of general warrants—a condemnation that was well known to the framers of the Constitution.

As this Court has remarked (*Boyd* v. *United States,* 116 U.S. 616, 626–627), *Entick* was considered during the formative years of our Republic as the "true and ultimate expression of constitutional law" that informed those who drafted and approved the Fourth Amendment. The colonists' concern with general warrants was strengthened by their experience with the infamous writs of assistance, which permitted the bearer to enter anywhere during daylight hours to search for and seize goods imported in violation of the customs laws. Cf. *Stanford* v. *Texas,* 379 U.S. 476, 481–484. Madison's draft of the provision that became the Fourth Amendment reflected this concern.[16] The

[16] Madison addressed the House upon the introduction of the proposed amendments, arguing (1 Annals of Congress 456 (1789)):

"The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government."

A few months earlier, in a letter to George Eve, Madison had written (1 *Letters and Other Writings of James Madison* 446–447 (1865)):

"[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c."

text he introduced provided (1 Annals of Congress 784 (1789)):

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

The House understood that this amendment was intended to be aimed specifically and solely against the use of certain sorts of warrants; when Representative Benson proposed that the phrase "and no warrant shall issue" be substituted for "by warrants issuing," the proposal was soundly defeated. *Ibid.* The Benson version was finally adopted, it seems, by oversight. See Lasson, *History and Development of the Fourth Amendment of the United States Constitution* 101–102 (1937) (footnotes omitted; emphasis in original):

> [O]n August 24, when Benson as chairman of a Committee of Three, which had been appointed to arrange the amendments, reported an arrangement of the amendments as they were supposed to have been agreed upon by the

House, the *clause appeared as he had proposed it and as the House had rejected it.*

And so it stands today. The records do not show that the alteration was ever noticed or assented to as such by the House. In this form it was received and agreed to by the Senate. And the only remaining discussion by the House and Senate concerned those amendments upon which the two houses were not in accord.

Nothing in this history suggests that the framers desired to upset the settled practice allowing warrantless entries to effect arrests. Indeed, in both England and the United States the practice of making such entries has continued to the present day, and Hale's view, permitting the use of force, appears to have prevailed.[17]

[17] The rule has been so well settled that until recently it has received only the most casual treatment by the commentators. For example, Annotation, 5 A.L.R. 263 (1920), laid it down as a clear rule that "a police officer * * * may make a peaceable or forcible entry to search any premises without a search warrant, for the purpose of arresting one accused of felony * * *. But the person making the search must have reasonable and just cause to believe the person he seeks to arrest is on the premises searched." For other discussions of the American practice, see Taylor, *supra*, at 27–28; Wilgus, *supra*, 22 Mich. L. Rev. at 549; Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 50; *United States* v. *Hall*, 348 F.2d 837, 841 (C.A. 2) (Friendly, J.); *Commonwealth* v. *Carey*, 12 Cush. 246, 251–252 (Mass.). For other statements of the English rule see, *e.g.*, 4 Stephens, *New Commentaries on the Laws of England*, ch. 16, § 3, p. 359 (1845); 4 Blackstone, *Commentaries* 292 (1897); 1 Chitty, *Criminal Law* 15–26, 33, 51–59 (1847); 10 Halsbury's *Laws of England* 354 (3d ed. 1955).

2. This Court Has Acknowledged The Validity of Warrantless Entries To Effect Probable Cause Arrests

Until the last few decades, this Court had not been confronted with a claim that a warrant was required to enter a private place in search of a person whom there was probable cause to arrest. Perhaps the first case presenting the question was *Johnson* v. *United States,* 333 U.S. 10. There officers entered a hotel room and arrested the occupant for drug offenses. The Court held that a warrant was required to enter the room under the circumstances of the case because, since the officers did not know the identity of the individual within, the entry could not be justified as an arrest entry. The Court indicated, however, that if the officers had known the identity of the person to be arrested, they could have entered without a warrant to make an arrest "for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty" (333 U.S. at 15; footnote omitted).

The dictum in *Johnson* was reiterated in *Trupiano* v. *United States,* 334 U.S. 699, 704–705. The officers, who knew that several individuals had built and were operating a still, had more than three weeks to procure search or arrest warrants. Instead of securing warrants, they converged upon the building in which the still was located and arrested one Antoniole, who was found within. The Court indicated that the arrest was proper where the arresting officers observed An-

toniole committing the crime.[18] Cf. *United States* v. *Rabinowitz,* 339 U.S. 56, 60 (warrantless arrest entry proper where officers have probable cause to believe that a felony is being committed in their presence) (dictum).

Then, in *Miller* v. *United States,* 357 U.S. 301, the Court dealt with an arrest similar to the arrest of respondents. A man named Reed had been arrested for a drug offense. He told the police that he had purchased his heroin from Shepherd, who procured his supply from Miller. At 3:00 a.m., a federal agent went to Shepherd's home and paid $100 to Shepherd, who promised to secure heroin from Miller. Shepherd went to Miller's apartment house and emerged with heroin and without the $100. A group of federal agents and local police immediately proceeded to Miller's apartment, broke in, arrested Miller, and recovered the $100. The Court held that evidence seized in Miller's apartment must be suppressed because the officers had not announced their authority and purpose before breaking in; it indicated that, if the proper announcement had been made, the entry, arrest and seizure of evidence would have been proper, 357 U.S. at 302–308.

Ker v. *California,* 374 U.S. 23, held that the standards of conduct applicable to the federal government

[18] The Court also concluded that it was improper to seize items found in plain view when Antoniole was arrested. This portion of *Trupiano* was overruled by *United States* v. *Rabinowitz*, 339 U.S. 56. *Rabinowitz* was in turn overruled by *Chimel* v. *California*, 395 U.S. 752, to the extent *Rabinowitz* allowed a seizure of items not found in plain view or within the immediate control of the person arrested. Neither *Rabinowitz* nor *Chimel* affected the discussion in *Trupiano* relating to the validity of the arrest of Antoniole.

under the Fourth Amendment also apply to the States under the Fourteenth Amendment. The official conduct involved in *Ker* was a warrantless entry into an apartment for the purpose of making a warrantless arrest. The Court upheld the warrantless entry. Even the dissenters contended only that the officers had not adequately announced their authority and purposes before breaking into the apartment. See *id.* at 47–49 (Brennan, J., dissenting in part). No Justice questioned the rule that a warrantless forcible entry properly can follow such an announcement, and four Justices expressly adopted that rule.

Finally, in *Sabbath* v. *United States,* 391 U.S. 585, the Court again indicated that an entry to make an arrest on probable cause is reasonable within the meaning of the Fourth Amendment if preceded by the proper announcement and demand. It wrote: "This Court has held * * * that the validity of an entry of a federal officer to effect an arrest without a warrant 'must be tested by criteria identical with those embodied in' [18 U.S.C. 3109]" (391 U.S. at 588, footnote omitted, quoting from *Miller, supra,* 357 U.S. at 306). Section 3109 authorizes forcible entry after notice of authority and demand to enter. Although the Court held that an unannounced entry through an unlocked but closed door did not meet the criteria of Section 3109, the proposition that the arrest entry would have been upheld if the requirement of announcement had been observed is implicit in its decision.

Although none of these cases expressly hold that warrantless arrest entries are presumptively reason-

able within the meaning of the Fourth Amendment, all of them appear to accept the common law rule as so much a part of our jurisprudence that it could be acknowledged without the need for a formal holding. At the time the Court was writing these decisions, every State that had occasion to consider the matter had provided for warrantless arrest entries; the validity of such police action was clearly a part of the fabric of our law.[19] There was little need to endorse

[19] ALI *A Model Code of Pre-Arraignment Procedure* 240–241 (Official Draft 1972), collects the statutes in 37 States establishing the right to make entries to effect arrests without warrants. Other States have approved the practice by judicial decision. See *People* v. *Eddington*, 23 Mich. App. 210, affirmed, 387 Mich. 551, 198 N.W. 2d 297; *Wanzer* v. *State*, 202 Md. 601, 97 A.2d 914; *State* v. *Doyle*, 42 N.J. 334, 200 A.2d 606. In Pennsylvania the power to make warrantless arrests is granted by Pa. R. Crim. P. 101 and 130. See also *Commonwealth* v. *Bosurgi*, 411 Pa. 56, 66; *Commonwealth* v. *Rush*, 326 A.2d 340 (Pa. Sup. Ct.); *Commonwealth* v. *Hughes*, *supra*. Congress is in agreement. See D.C. Code § 23–591 (1973).

The state statutes also reflect the division in the common law cases regarding the permissibility of using force to effect an arrest entry. Thirty of the 37 statutes allow forcible warrantless entries to make felony arrests, while the remaining seven statutes require a warrant to break open doors. Several of the statutes allowing warrantless entries have been amended or carried forward after the date of the ALI's compilation, but none of the States has changed its position. See Alaska Statutes § 12.25.100 (1973); Colorado Revised Statutes, tit. 16, § 3–101(3) (1974); West's Florida Statutes Annotated § 901.19(1) (1973); Kansas Statutes Annotated § 22–2405 (1974); Michigan Statutes Annotated § 28.880 (1972); Mississippi Code Annotated § 99–3–11 (1973); Nebraska Revised Statutes § 29.411 (Cum. Supp. 1974); Nevada Revised Statutes § 171.138 (1973); North Carolina General Statutes § 15–43 (1975); North Dakota Century Code Annotated § 29–06–14 (1974); Ohio Revised Code Annotated § 2935.12 (Anderson 1975); Oregon Revised Statutes § 133.320 (1973–1974).

the rule because defendants in criminal cases did not challenge it.

We know of no cases in this Court supporting a contrary position, although doubts have been expressed. In *Jones* v. *United States*, 357 U.S. 493, 499–500, the Court's holding enabled it to avoid "a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." (The entry in the instant case did not occur at night, nor was it forceful.) Four justices expressed doubts in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 476–481, reasoning that "[i]t is clear * * * that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances'" (403 U.S. at 477–478). The plurality in *Coolidge* found it unnecessary to resolve this conflict. And so the rule stands today.[20]

[20] The plurality in *Coolidge* believed that "[t]he case of *Warden* v. *Hayden*, *supra*, where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the

3. *There Is No Persuasive Reason to Set Aside 400 Years of Practice and Establish a Presumptive Rule That a Warrant Is Necessary to Enter a Private Place to Make an Arrest on Probable Cause*

The common law practice of making warrantless entries to effect felony arrests has been followed in most States.[21] Until recently it also had been approved by the lower federal courts. However, in 1970 the District of Columbia Circuit adopted a rule, subject to broadly-defined exceptions, that warrants ordinarly are required to make arrest entries (*Dorman* v. *United States,* 435 F. 2d 385 (*en banc*)).[22] The *Dorman* approach has been adopted by the Fourth, Sixth, Eighth, and Ninth Circuits, and by the highest courts of three States.[23] Other courts of appeals have continued to follow the common law practice.[24] Still others have not had an opportunity to speak on this subject since *Dorman.*

absence of exigent circumstances." 403 U.S. at 480–481. We respectfully disagree with this analysis. *Hayden* used the "hot pursuit" justification both to justify the entry to make an arrest and to justify the thorough search of the house in which the suspect was hiding. The officers searched, for example, the contents of a washing machine. Whether or not the officers were at liberty to enter to make the arrest, the "hot pursuit" justification would have been necessary to support the extensive search. Moreover, we do not believe that a practice so long used in Anglo-American law can be rejected by "negative implication." Nor has the Court interpreted *Hayden* in the fashion suggested by the plurality in *Coolidge*. See *Sabbath, supra.*

[21] See note 19, *supra.*

[22] *Dorman* overruled *Washington* v. *United States,* 263 F. 2d 742 (C.A.D.C.) (Burger, J.), which had approved warrantless arrest entries.

[23] *Vance* v. *North Carolina,* 432 F. 2d 984 (C.A. 4); *United States* v. *Shye,* 492 F. 2d 886, 891 (C.A. 6); *Salvador* v. *United States,* 505 F. 2d 1348 (C.A. 8); *United States* v. *Phillips,* 497 F. 2d 1131 (C.A. 9); *Commonwealth* v. *Forde,* 329 N.E. 2d 717 (Mass.); *Stuck* v. *State,* 255 Ind. 350, 264 N.E. 2d 611; *Nilson* v. *State,* 272 Md. 179, 185–191, 321 A. 2d 301, 304–308.

We submit that the Court should not now set aside a practice long followed in England and this country. While we do not suggest that history ought to blind this Court to the interests involved in warrantless arrest entries, "recognition of that reality does not liberate us from all historical restraint." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 256 (Powell, J., concurring). When courts and legislatures have for centuries followed a settled practice, this Court is perforce constrained not to consider the validity of the practice as though it were a matter of first impression.

We do not rely, however, upon history and *stare decisis* alone for support. The American Law Institute recently completed its study of pre-arraignment procedures and has concluded that officers should continue to be empowered to make warrantless arrest entries. ALI, *A Model Code of Pre-Arraignment Procedure* § 120.6(1) (Official Draft 1972). The *Model Code* would change the traditional rule only to the extent of establishing a presumptive need for a warrant to

[24] See *United States* v. *Fernandez,* 480 F. 2d 726, 740, n. 20 (C.A. 2) (Friendly, J.); *United States* v. *Wysocki,* 457 F. 2d 1155, 1159 (C.A. 5) ("In our judgment not only did the officers, *as prudent men,* have probable cause to arrest Wysocki, they would have been negligent and derelict in the performance of their duties if they had failed to arrest him"); *United States ex rel. Wright* v. *Woods,* 432 F. 2d 1143 (C.A. 7). The position of the Third Circuit is less than clear. See *Fisher* v. *Volz.* 496 F. 2d 333; *United States* v. *Miles,* 468 F. 2d 482; *United States* v. *Davis,* 461 F. 2d 1026.

make an arrest in the nighttime; even then, no warrant would be necessary if the officer making the arrest reasonably believed that a prompt arrest would be necessary to prevent escape, harm to bystanders, or destruction of evidence (*id.* at § 120.6(3)(b)). The commentary explains that the requirement of probable cause for a daytime arrest provides ample protection to the legitimate interests of the individual. "To go further and require a warrant or a showing of necessity before police may make a felony arrest on private property even in daytime seems unduly restrictive" (*id.* at 146).

The distinction drawn by the American Law Institute is a reasonable one.[25] People are different from things because people are more active than things. To require a warrant as a matter of course before the police can enter a house to make an arrest would in many cases offer the suspect unacceptably large opportunities to escape or destroy evidence. Law enforcement officers might be able to avert escapes by placing suspects under "house arrest" while a warrant is being sought, but that course, too, has its dangers. Upon learning of his "house arrest," the suspect could destroy any evidence within the house. He also could arm himself and endanger the lives of the officers when they eventually attempt to make the arrest.[26]

[25] See also ALI, *Code of Criminal Procedure* § 28 (1930); ALI, *Restatement (Second) of Torts* § 206 (1965), which adopt the common law rules.

[26] In most cases it is not possible for officers to ascertain in advance whether suspects are armed. In the instant case respondents were not armed when they were apprehended. But the officers did not know this. And respondents might have had weapons in the house that they could have used if they had been put on notice of the impending arrest.

Moreover, entries to make arrests are, as a class, less intrusive than entries to search for things. Ordinarily, when officers arrive at a house for the purpose of arresting a particular individual, that individual will come to the door and accede to the officers' demand, and no entry into the premises will be required. A search, on the other hand, will ordinarily require intrusion into the premises.[27] And even if the individual whom the officers seek to arrest attempts to hide, the scope of the search for his person will be far less intrusive than the typical search, since it will involve no rummaging through private papers, drawers and cupboards, medicine cabinets, or the like.

The burden of our argument is that the Fourth Amendment requires only that official actions be reasonable, and that arrest entries, as a class, should be deemed presumptively reasonable if the officers have good grounds to believe that a person whom they have probable cause to arrest for a felony is within. True, the Court has held that an entry into a house to search for a chattel is unreasonable unless authorized by a warrant, justified by exigent circumstances, or authorized by the consent of the occupant. But reasonable-

[27] It is true that, in at least some instances, a search of the house could be avoided if the occupants produce the object sought. But usually, as in a search for drugs, stolen goods, gambling records, or the like, the police will need to search anyway to ensure that all of the material sought has been secured.

ness, not the presence or absence of a warrant, is the test in the last ana'vsis. As this Court has pointed out in analogous contexts, the question is not whether it would have been reasonable to get a warrant, but whether the official action was reasonable. *Cooper* v. *California,* 386 U.S. 58, 62; *United States* v. *Edwards,* 415 U.S. 800, 807. Cf. *Wyman* v. *James,* 400 U.S. 309, 318.

In summary, we submit that there are important differences between the considerations pertaining to the seizure of chattels and those pertaining to the seizure of people. Because of these differences—practical as well as historical—it is ordinarily reasonable for law enforcement officers to enter a house without a warrant to make an arrest. As Mr. Justice White has suggested in his dissent in *Coolidge* (403 U.S. at 512, n. 1), the time and mode of entry in a particular case may be unreasonable, and, if so, the arrest would be improper. But the possibility that some arrest entries will be unreasonable is not a sufficient justification for requiring warrants prior to all arrest entries.

C. ANY REQUIREMENT OF WARRANTS TO MAKE ARREST ENTRIES SHOULD BE LIMITED TO NIGHTTIME OR DELAYED ARRESTS

If, as the Court suggested in *Jones* and the plurality suggested in *Coolidge,* warrants sometimes should be obtained before entering a house to search for someone whom there is probable cause to arrest, the Court could formulate two different sorts of rule to achieve that result.

The first sort of rule, which we believe would be the more sound approach, would state that warrants are necessary in carefully defined situations. *Jones* expressed concern about forcible nighttime entries; a rule responding to this concern would require warrants for such entries, which by their nature are more intrusive than daytime entries. This rule would be similar to the rule suggested by the American Law Institute. (Indeed, it might well be regarded as unreasonable to make a nighttime entry, warrant or no warrant, when a daytime entry would have served as well.) Similarly, because entries to make arrests for crimes long completed are more likely to be mistaken, and are more open to abuse, than are entries to arrest individuals for freshly committed or ongoing crimes, the Court might hold that warrants ordinarily should be obtained to make arrests for crimes completed more than a few hours prior to the arrest. See our argument at pages 25–29, *supra.* The rules requiring warrants in such cases would, of course, be subject to the traditional exceptions for exigent circumstances or consent.

The second sort of rule would provide that a warrant is ordinarily required to make *any* arrest entry. This is the position taken by *Dorman,* which qualified the presumption in favor of a warrant with a lengthy list of circumstances that might justify warrantless entries. *Dorman, supra,* 435 F. 2d at 392–393.

If the Court holds that some arrest entries are unreasonable in the absence of a warrant, we submit that it should formulate a rule of the first sort in preference to the *Dorman* approach. Such a rule would give specific guidance to the officer contemplating the possibility of an arrest. The *Dorman* formulation, which requires numerous exceptions and "balancing" factors, offers no similar guidance. The *Dorman* court listed seven factors that police should consider when determining whether to make a warrantless arrest entry (*ibid.*). A list twice that length could easily be proposed.[28] But it is difficult to understand how the officer

[28] We can think of at least 15 relevant factors: (1) advance opportunity to obtain a warrant; (2) the nature of the premises entered (dwelling versus barn, for example); (3) likelihood of intruding upon the privacy of third parties; (4) whether the offense is ongoing or has been completed; (5) risk of escape or flight; (6) whether an informant or agent is already on the premises; (7) the gravity of the crime for which the arrest will be made, especially whether the crime involved violence; (8) whether the suspect is likely to endanger the officers when captured; (9) whether the suspect is likely to endanger third parties if allowed temporarily to remain at large; (10) the existence of an ulterior motive to search the premises on which the arrest will be made (this might be evidenced, for example, by the officers' failure to avail themselves of an earlier opportunity to make the arrest in a public place); (11) time of the arrest; (12) whether the entry is forcible; (13) how strong is the probability that the suspect is within the premises to be entered; (14) how long it would take to obtain a warrant if the attempt were made to do so; (15) whether the suspect is arrested in his own home (where he may be presumed to be) or elsewhere (where he is less likely to be).

can be expected to recall and balance numerous factors on the spur of the moment. What should he do if most factors indicate immediate arrest, and a few factors militate in favor of a delay to obtain a warrant? Such decisions are difficult to make even in hindsight with time for quiet contemplation. They would be impossible to make in the rush of events that often precede a decision to arrest. We submit that here, as was the case with fresh pursuit, it is advantageous to formulate a rule that holds to a minimum the inevitable areas of gray in which "reasonableness" must be assessed case-by-case.[29]

A rule permitting warrantless arrest entries in most cases, while ordinarily requiring a warrant under clearly defined circumstances (for example, at night), would achieve the degree of certainty necessary to notify officers of what is expected of them and to make the exclusionary rule an effective deterrent to misconduct.

D. EVEN IF THE COURT ADOPTS A PRESUMPTIVE RULE IN FAVOR OF WARRANTS, THE ARREST OF SANTANA WOULD COME WITHIN THE EXCEPTIONS TO THAT RULE

If the Court not only rejects the common law practice of warrantless arrest entries but also adopts the *Dorman* approach, it will then have to decide whether a warrant was required in this case. We have argued at pages 23–29, *supra*, that even if warrants ordinarily are required for arrest entries, there should be exceptions for arrest entries in the hours immediately after the crime and for entries in which the officers

[29] See pages 25–29, *supra*.

are following the suspect from a public place into a private place. Both of these justifications, which can conveniently (if somewhat misleadingly) be called "hot pursuit," are present here.

What is more, most of the countervailing factors enumerated in *Dorman* itself support the entry into Santana's vestibule. The district court found (Pet. App. 3a) that the crime involved here was a "grave" offense rather than a "complacent" one, satisfying the first factor listed in *Dorman* (435 F. 2d at 392). The court concluded that there was "strong probable cause" to arrest Santana (Pet. App. 3a). There was, of course, absolute certainty that Santana was on the premises to be entered. The officers were aware of the likelihood that, if Santana learned of McCafferty's arrest, respondents would have escaped or destroyed valuable evidence. No force was involved in the entry, which was made during daytime hours. The only *Dorman* factor militating in the opposite direction is the absence of a clear indication that respondents were armed. While the officers did not know whether respondents were armed, it would not have been unreasonable for the officers to have assumed that respondents, like many participants in the narcotics trade, either were armed or could acquire weapons rapidly. In sum, it would have been reasonable for Officer Gilletti to have concluded that his proposed course of action was consistent with the criteria set out in *Dorman*.[30] The entry was therefore reasonable,

[30] The officers' actions in the instant case also are consistent with the additional factors we enumerated at note 28, *supra*: (1) There was no advance opportunity to obtain a warrant for Santana's arrest; (3) there was minimal likelihood of intruding upon the privacy of third parties; (4) there was an offense ongoing at the time of the arrest; (10) there was no ulterior motive to search the entire premises; (15) respondent Santana was arrested in her own home. The only factor militating against the arrest was (2)—that it was made in a residence rather than in some less private place. But even that is compensated for by the fact that Santana had exposed herself to public view by standing in her doorway.

and the evidence seized incident to that arrest was admissible in evidence.

E. EVEN IF THE OFFICERS SHOULD NOT HAVE FOLLOWED SANTANA INTO HER VESTIBULE, THE EVIDENCE SEIZED INCIDENT TO HER ARREST SHOULD NOT BE SUPPRESSED

The plurality in *Coolidge* was concerned about the invasion of privacy created when officers entered a house, without a warrant, in order to search for someone whom they had probable cause to arrest if they should find him. The concern was about privacy of place, rather than privacy of person. If that is so, then even if the officers should have obtained a warrant before pursuing Santana into her vestibule, the evidence they seized incident to her arrest should not have been suppressed. The evidence was not a fruit of an invasion of the privacy of Santana's residence. The evidence was seized, instead, as a result of the arrest. It would equally have been seized if the arrest had been made on the street or in the doorway, and it came to be found in the vestibule only because Santana carried it with her as she retreated.

If the Court holds that the officers should have obtained a warrant, it would follow that the prosecution

could not make use of things found in plain view in the interior of the house or otherwise within the area of permissible search under the doctrine of *Chimel*. But the exclusionary rule logically should require the exclusion only of those things that were within the privacy of the house, and the seizure of which was attributable to the fact that the officers were in a place where they should not have been. Where, as here, the seizure was a fruit of the arrest directly (the marked money was recovered from Santana's person, and the heroin from a bag she was carrying), rather than of the fact that the arrest occurred in a private place, the exclusionary rule has no proper role to play. The heroin and money should be admissible in evidence.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted.

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